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# In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA, *Plaintiff in Error,*
v.
WILLIAM E. ROGERS *et al.* | No. 147.

*IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

## BRIEF FOR THE UNITED STATES.

The writ of error in this case seeks to review a judgment of the Circuit Court of Appeals affirming a judgment of the District Court in a proceeding instituted by the Government to condemn land. The specific complaint is that the court added to the damages awarded by the commissioners a sum equivalent to 6% per annum on the amount of damages from the date the land was taken to the date when the amount of the award was deposited.

### STATEMENT.

The suit was brought January 18, 1915, in the mode prescribed by the Act of August 1, 1888, c. 728, 25 Stat. 357, in the District Court of the

United States for New Mexico, to condemn real estate of defendants in error in reliance on the Reclamation Act approved June 17, 1902, c. 1093, 32 Stat. 388. R. 4.

The petition avers that pursuant to the latter act and amendatory and supplemental legislation, the Secretary of the Interior December 18, 1905, caused to be purchased and thereafter maintained Carlsbad Irrigation System in Eddy County, New Mexico; that to provide water storage for more extensive irrigation of arid lands it was decided to construct additional works which were completed April 19, 1912; that, to carry out the provisions of the act of June 17, 1902, and amendments, and to provide the needed storage and for other necessary connected purposes, it became necessary, and the Secretary of the Interior so determined, to acquire defendants' real estate, and, at the date of completion of the additional works, lands of defendants were flooded "*and thereby appropriated by the Government of the United States under authority of the said Acts of Congress aforesaid for said necessary purposes;*" that the owners have received no compensation; that funds necessary to pay "any and all damages that may be awarded to said defendants, and each of them, on account of the taking and appropriation by plaintiff of the lands and real estate hereinafter described" are now available in the reclamation fund; that the Attorney General,

following a request of the Secretary of the Interior, dated December 19, 1914, has caused proceedings to be instituted for condemnation of real estate so appropriated by the United States April 19, 1912. R. 6–8. It was prayed that the court appoint commissioners to assess the damages which the owners had sustained in consequence of the taking and appropriation by plaintiff of the several real estates described; that upon payment of the amount thus assessed the land be adjudged and decreed by the court *to be the property of plaintiff from the date of the said taking or appropriation thereof* " by said plaintiff as aforesaid " to be held in " fee simple." R. 55.

The record does not indicate what pleadings, if any, were filed by the defendant land owners. The matter of compensation was submitted to commissioners, whose awards were filed February 3, 1917. Judgment, overruling exceptions, approving and confirming the awards and reciting that no appeals had been perfected, was entered July 27, 1917, directing that the aggregate sum of the awards on account of the taking and appropriation be deposited and distributed for the benefit of the several owners (R. 56–57) and ordering that, on such deposit, the United States of America be let into possession of the premises for the uses and purposes set forth in the petition. R. 68.

Nothing appears in the record from which it can be learned that defendants in error in pleadings,

or at trial before the commissioners, or by application to the court to instruct the commissioners, brought forward—

(a) a demand that interest be added to the appraisal either as of right or as a proper and convenient method of measuring damages assessable for deprivation of use and occupation prior to payment for the land;

(b) a claim that any *actual* damage had been sustained because of such deprivation;

(c) evidence to establish the *fact* or the *quantum* of such actual damage before the commission or the court.

Defendants in error did not except to the judgment of July 27, 1917, but some time thereafter presented a motion (R. 69) for supplemental order, requiring the United States to deposit sums equal to six per cent interest on the several awards, calculated from April 19, 1912, until date of their deposit, representing that nothing by way of interest had been added thereto by the commissioners. Thereupon the court, on October 1, 1917, allowed the order requiring deposit of the additional sum asked for, to which action the United States excepted (R. 71) and prosecuted writ of error from the Circuit Court of Appeals, Eighth Circuit, which on March 25, 1919, affirmed the judgment below. R. 79. To review this judgment a writ of error from this court has been sued out. The opinion below (R. 78) is reported in 257 Fed. 397.

Considering what is averred in the petition it appears that the government exercising eminent domain power took possession of private lands April 19, 1912; instituted judicial proceedings formally to expropriate them January 18, 1915, and paid into court about July 27, 1917, damages awarded by court commissioners therefor but without interest as such on the sum found due. The judgment thereafter, whereby the court as matter of legal right added a sum equivalent to six per cent (the legal rate of interest in New Mexico), is justified on the ground that "when in the exercise of its sovereign power the government actually appropriates and takes possession of private property in advance of proceedings in condemnation, interest from the time of taking is in a sense a convenient commutation of the value of the use of the property or the direct loss the owner sustains until the value of the property itself is paid by deposit in court or otherwise." Opinion, C. C. A., R. 78.

SPECIFICATION OF ERRORS.

In substance the errors assigned are (R. 80–81):

(1) In proceedings for condemnation brought by the United States the interest claimed (at a fixed rate) for any period prior to final judgment or prior to a court order placing them in possession is not properly and legally allowable as of right or as part of the just compensation guaranteed by the Constitution.

(2) What compensation, if any, should be allowed as an added element of damages on account of use and occupation enjoyed prior to payment of compensation awarded for the land, is matter for consideration in the light of prevailing conditions by the commissioners of appraisal or by jury.

(3) As defendants in error did not demand interest in their pleadings or request of the commissioners its allowance, or, in lieu thereof, damages for use and occupation, or ask the court to instruct the commissioners to allow either interest or damages, it was error for the court to enter the order for payment of interest after hearing and judgment confirming the report.

The error stated broadly was in ruling that in this proceeding, under the pleadings as framed, the landowner was entitled as of right, in addition to the appraised value of the land, to the equivalent of interest thereon at the local prevailing rate in lieu of compensation representing the actual value of the use of the property from 1912, when it was taken, to the date when its value was finally judicially fixed and paid. More narrowly, since the damages actually sustained because of such prior use were not left to the judgment of the commissioners, it was not the province of the court to determine them afterwards by adding to the award interest at the rate fixed by the law of New Mexico, and hence it was error to rule that, as the necessary result of the

facts on the record, the award bore interest as of right at a fixed rate as a convenient commutation of the loss of possession.

ARGUMENT.

Whether interest at the prevailing local rate is really the substantial equivalent of the actual damages suffered by loss of the use of real estate (its rental value) is a question of fact which should be left, under proper instructions as to evidence, to appraisers or to a jury. The sum due from the United States as compensation for use of premises occupied under the power of eminent domain should not be measured by what the several state authorities fix as the legal rate of interest on borrowed money. Cases can be imagined where the loss thus sustained would not be adequately compensated by interest at a low rate. It is as easy to imagine instances where the legal state rate might be so high as to furnish no true measure of rental value especially of unprofitable wild land. It would thus come to pass that, if local regulation of interest rates on money *furnishes* the *rule* and *measure* of damages, the state government, by fixing an *excessive* rate, might successfully prevent the temporary occupation of land for Federal purposes except on terms of compensation so onerous as to be practically inhibitive. Since it is hardly arguable that the exercise of eminent domain may be thus hampered or impeded, it must follow that there was a substantial procedural error in not

allowing the commissioners to hear evidence and determine whether damages actually suffered by loss of possession were equal to or greater or less than interest at six per cent on the appraised value of the land.

Apparently there was no evidence offered on the subject at any time and there was no exception taken to the order of July 27, 1917, confirming the appraisal, which did not include interest. As it would not now seem open to remand with directions to constitute another commission to assess the actual damages suffered, defendants in error seem driven to the contention that interest as such on the award is allowable as of right and this is the crucial point.

Cases involving claims for interest have been dealt with heretofore by this court, but none quite like this. Federal statutes authorizing these proceedings ordinarily do not provide for taking possession of or for translation of title to real estates prior to the judicial appraisal and its payment. In such instances, since the payment is regarded as the operative act which transfers title to the government and moreover as the owner retains possession *pendente lite*, it has been settled that interest must not be added to the award for any period preceding its payment.[1]

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[1] *United States* v. *Sargent*, 162 Fed. 81 (a precedent adopted in the instant case by the Circuit Court of Appeals) belongs to the class now under discussion. It was brought under the Act of August 1, 1888, *supra*, to acquire a Federal building site and it does not appear that possession was taken until payment of award. The dissenting opinion (p. 89) points out the clear conflict between the majority opinion and the two decisions of the Supreme Court just cited.

*Shoemaker* v. *United States*, 147 U. S. 282, 320;

*Bauman* v. *Ross*, 167 U. S. 548, 598;

*In re Post Office, etc., Bronx*, 210 Fed. 832;

*Cf. Cherokee Nation* v. *Kansas Ry. Co.*, 135 U. S. 641, 659–660;

*Turner* v. *Woodard*, 259 Fed. 737.

By the Act of July 2, 1917, c. 35, 40 Stat. 241, authority is given for expropriation of real estates for military uses, and it is provided "that when such property is acquired in time of war * * * upon the filing of the petition for the condemnation * * * immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes." Power to occupy *pendente lite* before assessment of compensation having been expressly conferred by this act on the Secretary of War, it has been supposed that, in addition to the price of the land itself, its owner is entitled to additional compensation (assessable in the proceedings authorized by the act) for the temporary occupation of his premises. In *United States* v. *First Nat. Bank*, 250 Fed. 299 (Ann. Cases 1918–E, page 36), a case brought under this statute, the owner was held entitled to the land value plus interest at the Alabama *rate*. It is submitted that there was error here (as there was in the case at bar) in assuming that, without any evidence on the subject, interest at a fixed rate can be regarded as the equivalent or measure of the actual damages suffered.

Here owners were not left in undisturbed enjoyment of their estates until payment, and hence the instant case is distinguishable from *Shoemaker* v. *United States, supra.* It differs also from those arising under the Act of July 2, 1917, *supra,* because here there is no statute authorizing disturbance of private possession before payment. The Reclamation Act authorizes acquisition of needed land only by purchase or by expropriation under *judicial* process. 32 Stat. 389, § 7. There is no legislative authority for administrative seizure of possession *pendente lite.* However, contentions founded on this distinction, which, on a different record, might well be urged, are not thought available here. In the petition presented by the government it is formally averred that the lands were appropriated in 1912 under authority of acts of Congress and that funds necessary to pay any and all damages * * * are available in the Reclamation Fund. Considering these allegations, the government does not insist that occupation for the period preceding payment was not legally or formally authorized. The argument is limited to the proposition that, on established principles, *interest* is not here legally collectible and that judgment allowing it should be reversed.[1]

[1] It might be open on a different record to contend either—

(*a*) That possession before payment by an officer is trespass for which no recovery can be had, or

(*b*) If the dam was legally authorized and if the consequence was to flood private lands, that the owners upon principles announced in *United States v. Lynah,* 188 U. S. 445, and many like cases, were en-

(1) The United States are not contractually bound for interest except by express agreement. Here obviously there is no such contract though it may be argued that the obligation to compensate for expropriated property is in the nature of an implied contract. But as such implications are admitted merely to further recovery on an assumed obligation, it is necessary to determine its extent. The limits of the particular obligation here involved (payment of compensation) have been often precisely and authoritatively defined. The implied promise is to pay the value of the property as of date of the taking but without interest. An obligation to pay interest is not *implied*. *United States* v. *North American Transp. Co.*, decided by this court June 1, 1920.

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titled under section 145 or paragraph 20 of section 24 of the Judicial Code, to sue on implied contract to pay rent for private property informally occupied by government.

(*c*) that suit under these sections resulting in a *judgment* for damages for the informal temporary occupation of the land before the government takes title is the appropriate and *only* remedy because this is the only mode in which the United States have consented to be impleaded.

Statutory condemnation proceedings are but inquests to ascertain judicially the value of land as the condition of extinguishing the private title. Appraisals are not reduced to judgment and obviously can not take the form of unconditional judgments against the United States. Therefore, when proceedings under the Act of August 1, 1888, are brought the sole issue is the value of the *estate sought* to be *expropriated*. If it should appear that through its officers the government has already informally taken possession of the land, the damages on this account having already been sustained are not properly the subject of appraisement in this statutory inquest, but must be recovered in a separate and independent action wherein it is possible under applicable law to reduce them to judgment.

So that, conceding for argument that it is open to the land owner to claim his rights under the implied promise, his assertion of them here can add nothing to the extent of the obligation and his recovery here (as it would in the Court of Claims) would exclude interest.[1]

(2) While obligation to pay interest may be imposed by statute, there is no federal legislation justifying addition of interest as such to this award.

It is claimed that under the law of New Mexico interest in like cases is recoverable, and, basing the argument on the Act of August 1, 1888, it is urged that thereby the New Mexico rule has been adopted as the federal code governing the measure of damages in federal condemnations brought in New Mexico.

No authoritative case has been found holding that the United States have adopted the local code in respect of matters of substantive law. The quantum of compensation due for expropriation of land is a matter of substance. It is essentially a federal question to be determined upon construction of the Constitution and the statutes of the United States and by independent application of general principles of jurisprudence thereto.

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[1] Suits on implied contracts of the government have no proper place in statutory condemnation proceedings brought under the act of August 1, 1888, *supra*. The purpose of these proceedings is to exert power conferred on government to procure an appraisal or inquest of value, which *provided* it is accepted and paid by the official controlling the appropriation, completes the taking determined by him to be necessary.

*Carlisle* v. *Cooper,* 64 Fed. 472;

*Highbridge Lumber Co.* v. *United States,* 69 Fed. 320;

*Town of Nahant* v. *United States,* 136 Fed. 273;

*United States* v. *O'Neill,* 198 Fed. 677, 680, 682;

*Latinette* v. *City of St. Louis,* 201 Fed. 676, 678;

*Kanakanui* v. *United States,* 244 Fed. 923;

*United States* v. *Forbes,* 259 Fed. 585, 594;

Cf. also *Kohl* v. *United States,* 91 U. S. 367; *Chappell* v. *United States,* 160 U. S. 499, 509, 512–514; *In re Secretary of the Treasury,* 45 Fed. 396; *United States* v. *Certain Lands in Newcastle,* 165 Fed. 783, 786–7; Dissenting opinion *United States* v. *Sargent,* 162 Fed. 85.

**CONTRA.**

*United States* v. *Engeman,* 46 Fed. 898, a case which appears not to have been followed in the second circuit.

*Town of Hingham* v. *United States,* 161 Fed. 295, 300, a case which supports denial of interest but which seems to base its reasoning on the controlling effect of the state law. The suit was prosecuted under a statute whose text differs from that of the Act of August 1, 1888, but which is thought to have the same meaning.

*United States* v. *Sargent,* 162 Fed. 81. The majority opinion while allowing interest does not admit controlling effect of the state law. Page 84.

The language of the second section of the Act of August 1, 1888, is modal and directory and but carries over into condemnation proceedings the similar provision found in section 914, R. S. It was designed to bring about conformity to state practice. It has no reference to substantive rights or obligations. To illustrate:

In *United States* v. *O'Neill, supra,* it was held that the fundamental question of the necessity for the taking was not regulated by a state law but was entirely a federal question. In the same case a state statute requiring deposit of the award in certain circumstances was not followed.

In *Carlisle* v. *Cooper, supra,* state statutes imposing costs and allowances were ignored because thereby a substantive obligation was imposed inadmissible against the government.

In *Highbridge Lumber Co.* v. *United States, supra,* it is said in substance that whether consequential damages are recoverable is a federal question.

In the well considered opinion in *Town of Nahant* v. *United States, supra,* it is held that both the right to compensation and its measure may be determined without regard to state law.

Considering what is said in the cited cases (well summed up in *Kanakanui* v. *United States, supra*), it will be seen that it is logically impossible to assume that federal power of eminent domain was intended by the Congress to be exerted on conditions prescribed by the varying laws of the

forty-eight states of the Union. If federal rights and obligations are thus controlled, it is conceivable that federal *power* might be frustrated by local legislation or decisions hampering it with impossible or impracticable conditions or too costly requirements. It was not intended by this statute to curb or control the federal judiciary in settling the limits of the "just compensation" guaranteed by the Fifth Amendment by forcing them to adhere to principles formulated by state legislatures or state courts, some of which might fall short of justice either to the land owner or to the government.

As it seems clear that the Congress has not adopted the local code of New Mexico in respect to any matter affecting substantive rights or obligations of the United States, it follows that there is no statute imposing obligation to pay interest in eminent domain proceedings.

Section 721, R. S., adopting state laws as rules of decision in the federal courts in cases where they apply, does not oblige the United States to pay interest made legal by New Mexico because her laws do not (even if they purport to do so) confer on the United States power to expropriate land within her borders. The power here employed having its source exclusively in the *federal statutes* on the subject, state law cannot affect the federal government in this or indeed in any other of its sovereign capacities. *Town of Nahant* v.

*United States,* 136 Fed. 273, 276. Consequently, substantive rights and obligations springing therefrom, even when, as suitor, the government asserts them in its courts, are not subject, because of section 721, to either express or implied limitation or definition by state authority.

*Carlisle* v. *Cooper,* 64 Fed. 472, 474;
*Savings Bank* v. *United States,* 19 Wall. 227, 237, 240;
*United States* v. *Herron,* 20 Wall. 251, 255, 260;
*United States* v. *Thompson,* 98 U. S. 486;
Cf. *Billings* v. *United States,* 232 U. S. 261, 284.

(3) It is not only well recognized that the United States are not obliged to pay interest except under express contract or statute (*United States* v. *North Carolina,* 136 U. S. 211), but, furthermore, no sovereign state is bound to pay interest because payment of its obligations has been delayed. Interest as damages for detention of money (though sometimes recoverable from individuals) cannot be added to obligations of the United States. This distinction is based upon the presumption of law that the government is always ready and willing to pay its debts and that delay or default cannot be attributed to it. Ibid.

*United States* v. *Sherman,* 98 U. S. 565;
*Angarica* v. *Bayard,* 127 U. S. 251, 260;
*United States* v. *Verdier,* 164 U. S. 213, 218, 219.

It should be noted that the delay here was not due to default or to unwillingness to pay, but occurred because the government and the land owner could not agree on the value of the property. R. 19. It thus became necessary to submit that question to indifferent appraisers in the mode prescribed by the condemnation statute. The damages claimed were impossible of liquidation until this process resulted in an award. Until then there was no *certain sum* due or demandable. In submitting the question to the courts, as prescribed by statute, the government pursued the only course available to liquidate its indebtedness and hence cannot be said to be guilty of detaining or withholding an *ascertained* debt.

From the foregoing it follows:

That in the absence of proof that a sum equal to six per cent on the award was the equivalent of actual damage sustained by occupation prior to the award, the court erred when, of its own motion and without submitting the matter to the commission, it entered the order of October 1, 1917, directing deposit of interest.

Aside from this, it is also clear that if the matter had been submitted, as it should, to be tried by the commissioners it would have been error to instruct them that, *as matter of law and without further proof,* they might add interest at the fixed rate of six per cent as the equivalent of or in lieu of damages actually due the land owner for loss of possession.

This proposition grows clearer when we consider that, if interest at a *fixed rate* is the allowable and convenient substitute for or measure of the damages due for the sovereign's use and occupation of land prior to payment therefor, the rule must be applied in *every case.* And hence the owner of a vacant city lot or of wild unproductive land having a nominal rental value would receive the same proportionate compensation as would be awarded under the rule to the owner of productive real estate whose rental value on the market is double the legal rate of interest.

It is impossible to escape the conclusion that when interest at a fixed rate is added to the award as a *legal right,* it is in substance and effect precisely the same thing as allowance of interest as *damages* for *delay* in paying for the land. Since it is evident the statutory rate of interest on loaned money is not always or often the standard by which rental value—the actual loss—can be justly estimated, plainly the consideration which induced its application in this case was that it was thought right to add interest for the *detention* of the price of the land. But this, however just in the abstract, cannot be done in respect of a payment delayed by the government.

The petition alleges that the actual appropriation took place in 1912. Payment said to represent the value of the fee only estimated as of April 19, 1912, was made in 1917. The government has extinguished the private title in consideration of this

payment. In addition it has had possession from 1912 to 1917, while the owner has lost whatever such possession may have been worth on the market. The case for defendants in error, favorably stated, is that the award for the value of their estates has not compensated in full for all that has been lost and that, from the standpoint of equity, the award without interest falls short of actually compensating for five years' loss of use of their property.

The government has endeavored to show that the loss, if it occurred and is not represented in the award, cannot be made up by requiring the government to pay interest. It is not necessary to discuss whether, if evidence showing market value (measured in terms of rent or otherwise) of use of the land for the period had been offered, the land owner should have had an additional award. Assuming that it would be just to allow it, it does not appear from the record that any effort was made before the commission or elsewhere to prove rental value or other actual loss suffered. The burden of proving his losses is on the land owner.

> 2 *Lewis Em. Dom.* (3rd Ed.), § 645, pp. 1112–1115;
> 2 *Nichols Em. Dom.* (2nd Ed.), § 432, pp. 1138–1140.

He has not assumed this burden and, moreover, failed to except to the order of July 27, 1917 (R. 56–68), directing deposit of the awards brought

in by the commissioners which did not include interest. The supplemental order of October 1, 1917 (R. 70–71), was entered on motion without further proof. If reversed by this court, it would follow that as the record stands the order of July 27, 1917, should not be modified and that a new trial to try the question of actual loss should not be accorded.

It should be noted that at any time after April 19, 1912, the land owner might have sued the United States under section 145 or section 24 (paragraph 20) of the Judicial Code, treating, as he might, the flooding as an expropriation vesting title to the land in the Government and vesting in him, *eo instanti*, a right of action on implied contract. *United States* v. *North American Transp. Co., supra.*

In this recent case—an appeal from a judgment of the Court of Claims allowing the value of land without interest on implied contract to compensate as of the date of its taking—the court, after stating the rule, in disposing of the point that interest should have been allowed (not *qua* interest for default or delay in payment, but as measure of compensation for use and occupation for the period preceding payment), said:

> It may be that, even in the absence of the conformity provision referred to above, interest could be collected as a part of the just compensation in condemnation proceedings brought by the Government.

The opinion then points out that in proceedings in the Court of Claims the basis of the action is recovery of money which the government is assumed to have promised to pay and that power to allow interest as such on that sum is denied and proceeds as follows:

> Furthermore, if it is not interest which the company seeks the facts found fail to supply the basis on which any claim in addition to that for the value of the property should rest. The petition states that the United States is indebted to claimant in addition to the $100,000 alleged to be the value of the property, the further sum of $7,500 per annum for the use and occupancy thereof from December 8, 1900. Except for this allegation the company did not, so far as appears, make any request of any kind in the court below in respect to an allowance for use and occupation. The court does not mention the subject in the opinion; and it is not referred to in the application for an appeal.

What the decision would be in statutory condemnation proceedings or in suit in the Court of Claims where there was proof of actual damage justifying allowance for use and occupation preceding payment is not explicitly indicated. The court does not say that there is anything in principles announced necessarily forbidding recovery on this account. But it is clear from the reasoning that recovery, if had, must be based on showing of actual loss, and, when that is lacking, that

interest can not be allowed of right by the court as the equivalent or as a substitute *for* damages claimed but not proven.

Space has not been taken for the many decisions which, construing state statutes or applying principles as to compensation thought sound by state courts, hold that interest must be added to the award from the time when the owner is dispossessed; or from the time proceedings are instituted; or from date of judgment and so forth.

1 *Nichols Em. Dom.* (2nd Ed.), §216;
2 *Lewis Em. Dom.* (3rd Ed.), §742;
10 *R. C. L.* 163;
15 *Cyc.* 930, 931.

These cases are mainly proceedings brought by or against public service corporations to whom eminent domain power has been delegated by the states. It is, of course, well within state power either by statute or by judicial construction to provide for interest on awards of damages due from such corporate bodies. The reasons upon which such recovery is allowed can throw no light whatever upon similar liability of the United States, because necessarily these decisions do not concern themselves with the immunity of the sovereign. Whereas, here, the proposition is that judgment for interest is improper because the United States as sovereign cannot be charged therefor except by contract or by statute and can never be held liable for interest as damages for the use or for the detention of money, or for delay in settlement of

claims. This, of course, is a principle wholly inapplicable to railroads or telegraph companies or other public service corporation exercising delegated eminent domain power.

In conclusion, the government desires again to urge that the decision here should not hinge on the theory that its substantive rights and obligations are regulated by the law of the state where the expropriated land lies.

As a rule judicial condemnations maintainable under federal legislation belong to one of two classes—

(a) Those like the instant case brought under the general procedural statute (Act of August 1, 1888, 25 Stat. 357), the second section of which reads:

> The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding.

(b) Those brought under Acts like that of July 2, 1917, 40 Stat. 241, already mentioned, providing in substance for—

> such proceedings to be *prosecuted* in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted.

It is most earnestly insisted that there was no intention *in either act* to adopt state codes in respect of matters of substantive law but that it was the purpose of Congress merely to regulate *practice* in the federal courts by requiring them to proceed in accordance with state adjective law in like causes.

The question directly pertinent here is the proper construction of the Act of August 1, 1888. Statement has already been made of the reasons and authorities relied on to show that it should not be construed as either textually or by implication adopting substantive state law. The argument, it is believed, applies with equal force to the construction of the Act of July 2, 1917, and some of the cited cases deal with statutes employing similar language.

If this court should, notwithstanding, hold that state law governs in this case on the substantive question of the quantum and measure of damages due, the precedent established will necessarily control in the construction of the Act of July 2, 1917. The consequences in respect of cases brought under either statute will be most serious.

Assuming that the state code is held to govern here, the applicable law is in part section 2106, New Mexico Ann. Stat. 1915, reading:

> For the purposes of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the notice, and its actual value at that date shall be the measure of compensation of all

> property to be actually taken, and also the basis of damages to property not actually taken but injuriously affected, and in all cases where such damages are legally recoverable. If an order be made letting the plaintiff into possession as provided in this chapter, the compensation and damages awarded shall draw lawful interest from the date of such order. No improvements put upon the property, subsequent to the date of the service of notice or put thereon after the actual taking of the land, shall be included in the assessment of compensation or damages.

In a proceeding brought in 1912 to condemn land tortiously occupied since 1907 with rails and other improvements by the condemning railroad, the New Mexico Supreme Court construed section 2106 (§ 9, c. 97, Laws of 1905), saying:

> While the provision quoted does not in terms cover a case where possession has been taken prior to condemnation proceedings, as in this case, we believe that the provision shows a legislative intent that the owner shall receive interest from the time his possession is invaded, either with or without an order of the court.
>
> *A. T. & S. F. Ry. Co.* v. *Richter,* 20 N. M. 278, 305.

The Circuit Court of Appeals cites this as a statement of the applicable New Mexico rule.

It is interesting to note (*passim*) that the court below appraised the property according to its value in 1912, when it was actually flooded and appro-

priated, thus completely ignoring section 2106, *supra,* which directs that the property must be valued as of the date of the notice of *presentation* of *petition for condemnation.* If there had been real compliance with local law and with its judicial interpretation, the land must have been valued as of January 18, 1915 (at which date it was lying under water) and to that must have been added interest (?) *for nearly three years preceding!!*

But, putting this anomaly aside, attention is called to the principal issue in the cited New Mexico case, which was whether the condemning railroad was bound, in addition to the value of the bare land, to pay its value as *enhanced* by improvements placed there before suit to condemn was begun. The Supreme Court, overruling the lower court, held in accordance with the weight of authority that the railroad was not thus obligated although its original entry on the land was tortious. It was at least open for the Supreme Court to agree with the lower New Mexico court. There is a respectable minority of cases holding that where entry is made without consent or without statutory authority, on suit afterwards brought to condemn, the value of the land as enhanced by the condemning party's betterments is recoverable. *Village of St. Johnsville* v. *Smith,* 184 N. Y. 341, 5 L. R. A. (N. S.) 922; *United States* v. *Land in Monterey County,* 47 Calif. 515.

If, during the present emergency, before filing petition for condemnation under the Act of July

2, 1917, or under other statutes in instances not covered by that Act, it has happened that the military authorities without owners' consent or against their protests have entered on private lands and constructed thereon valuable permanent improvements, and if furthermore this has occurred in New York or in any state where it has or may be held that in such circumstances the land value as affected by improvements in place at the time suit is filed is recoverable, it will follow, if the federal courts are bound to adhere to and apply the state law, that the United States will be bound to pay not only the value of the land when it was entered on but in addition thereto the millions of enhanced value created by public expenditures for buildings, roads, streets, railways, telegraph and telephone lines and so forth, and not only that but they must pay also interest on the *combined amounts.*

**CONCLUSION.**

It follows that the judgment of the Circuit Court of Appeals was erroneous and should be reversed.

Respectfully submitted.

FRANK K. NEBEKER,
*Assistant Attorney General.*
CHARLES S. LAWRENCE,
*Attorney.*

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